Filed 2/17/05 Horvath v. Wolfe CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

ALEXANDER WILLIAM HORVATH, Plaintiff and Respondent, v. JOSEPH WOLFE, Defendant and Appellant.	C045834 (Super. Ct. No. FC20010566)

Following the entry of an order to enforce a settlement agreement between plaintiff Alexander William Horvath and defendant Joseph Wolfe (Code Civ. Proc., § 664.6, (§ 664.6)), Wolfe purports to appeal from both the order and the ensuing judgment. We shall dismiss the appeal from the order, which is nonappealable, and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The complaint

On October 1, 2001, Horvath filed a "Complaint for Damages for Fraud, Negligent Misrepresentation, Quiet Title,

Constructive Trust, Breach of Oral Contract[,] and Declaratory Relief" against the following named defendants: Wolfe, the "Ritz Aubrey Trust," "the testate and intestate successors of Della Lorraine Horvath, deceased, and all persons claiming by, through, or under" her, Spartan Mortgage Services, Inc., and "all persons unknown, claiming any legal or equitable right, title, estate, lien or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto."[1] (Capitalization omitted.) The complaint alleges:

Horvath and Wolfe are stepfather and stepson. Horvath was married to Wolfe's mother, Della Horvath (Della), from 1969 until her death on April 17, 2001.

On or around September 19, 1991, Horvath and Della acquired the Sandor Chateau Motel (the motel) in South Lake Tahoe, California, the subject matter of this action, as community property.

In the course of "complex civil action[s]" filed by Horvath against Khatri Brothers Partnership (Khatri), the litigants reached a settlement under which Khatri agreed to sell a note and deed of trust secured by the motel to an associate of Horvath for $190,000 in return for Horvath's agreement to dismiss the actions with prejudice.[2] A loan from defendant

---

[1] Only Wolfe remains a party.

[2] The complaint does not explain the nature of the litigation or of Horvath's prior dealings with Khatri.

Spartan Mortgages, Inc. (Spartan) was arranged to finance the associate's purchase of the note and deed of trust.

Defendant Wolfe told Horvath that to obtain the loan, Horvath would have to remove his name from the record title for the motel. Wolfe promised Horvath $150,000 (one-half the equity in the motel) in return for doing so.[3]

On or around April 3, 2001, Horvath conveyed his fee interest in the motel to Della, who reconveyed it to Wolfe. The loan from Spartan went through, and the terms of Horvath's settlement agreement with Khatri were otherwise fulfilled. Della died soon afterward.

Wolfe never delivered the promised $150,000 to Horvath.

The answer

Wolfe denied the complaint's material allegations. He alleged in turn that he paid Khatri $180,000 to pay off an outstanding balance on a loan Horvath had obtained from Khatri, using the motel as security. Wolfe also alleged that he could not have made any oral agreement with Horvath because he had not spoken to Horvath in a year.

The settlement conference

Horvath's settlement conference statement, filed on August 27, 2002, additionally alleged: In early 2001 the motel was encumbered with two deeds of trust, one of which was due;

---

[3] The complaint does not clarify whether Wolfe and Horvath had a preexisting business relationship or what interest in the motel Wolfe claimed at that time.

the loan from Spartan was to refinance both deeds of trust; because the loan proceeds were not enough to close escrow, Horvath contributed an additional $50,000 from his own funds, for which he received nothing in return; Della and Wolfe contributed nothing. Wolfe now owned the motel in full and had never paid the $150,000 promised to Horvath in return for removing his name from the title. Horvath was willing to settle for $150,000 plus interest from April 3, 2001, and costs.

Wolfe's settlement conference statement, filed on September 17, 2002, alleged: Horvath and Della jointly owned and operated the motel from 1976 on. In 1990 Della suffered a disabling stroke. In 1992 Horvath left Della and moved to Fresno, where he operated another motel. In 1995, Della was left without a manager for the motel. Horvath requested that Della offer Wolfe $30,000 and a weekly salary to take up residence at the motel for a year until Horvath returned from Fresno; Wolfe did so. Horvath did not fulfill his promises: Wolfe received only $10,000 and Horvath never returned to help run the motel. Horvath then set out to purchase another motel, using the first motel's equity as collateral for a note to finance the venture. He did not make any payments on the note, and the second motel was foreclosed on. At this point, Della asked Horvath to release his interest in the first motel in order to refinance the property to pay off the note in the foreclosure sale. Horvath did so. There was no promise to pay him $150,000 for removing his name from the title. His claim that he put $50,000 of his own money into escrow was false. In

any event, he owed Wolfe well over that sum for the operation of the motel and for delinquent property taxes owing to the City of South Lake Tahoe.

The oral settlement agreement

On September 18, 2002, the parties entered into a stipulated oral settlement agreement in open court (and reported by a court reporter) before Temporary Judge Stephen Keller. The parties agreed as follows:

Wolfe would give Horvath a promissory note for $125,000, with interest at 8 percent per annum, payable monthly, and a deed of trust with "standard deed of trust language." Horvath would get fees and costs for any litigation relating to the note or its enforcement. A judgment would enter quieting title against all remaining defendants. Horvath would release his lis pendens against the motel on the recording of the deed of trust and judgment. The parties would cooperate in executing, signing, and recording all required documents within 30 days. Temporary Judge Keller would decide any disputes over the language in the note and deed of trust. Either party could bring a motion to enforce the settlement agreement. Temporary Judge Keller would retain jurisdiction to enforce the agreement, but without prejudice to either party's appeal rights. The parties waived all other known and unknown claims against each other. (Civ. Code, § 1542.)

Horvath's motion to enforce the settlement agreement

On July 29, 2003, Horvath filed a motion to enter judgment on the settlement agreement pursuant to section 664.6. The

motion alleged that Wolfe had failed to comply with the agreement in that (1) he and his counsel had never signed and returned the necessary documents, and (2) he had "sporadically" paid only $800.00 per month, rather than $833.33 per month as required by the agreement. The motion attached as exhibits: (1) a written "[s]tipulated [j]udgment" that recited the terms of the oral settlement agreement, bearing only the signature of Horvath's counsel; (2) an unsigned draft promissory note; and (3) an unsigned draft deed of trust.

Wolfe opposed the motion. As relevant on appeal, he contended: (1) the settlement agreement was unenforceably ambiguous, and (2) Horvath had obtained it by extrinsic fraud. As to the first point, Wolfe asserted that the language in the note and deed of trust prepared by Horvath was not the language Wolfe had agreed to, and the settlement agreement by its terms appeared to contemplate future disputes about that language.[4] As to the second point, Wolfe asserted that Horvath represented he was quitclaiming an interest in a legally rentable 17-unit motel, but failed to disclose that he had added five of those 17 units without permits from the City of South Lake Tahoe and the Tahoe Regional Planning Agency.

---

[4] Wolfe's supporting declaration averred: "It was my understanding that any . . . Note and Deed of Trust would have been exactly as the standard form used by title companies and as specified on the terms entered on the record not with all the additional specially drafted language in [Horvath's draft note and deed of trust]."

Horvath replied: (1) The settlement agreement was not ambiguous. It contemplated that the deed of trust would contain "standard deed of trust language, not title company language." Wolfe's counsel had orally approved the draft deed's language and had never formally disputed any of it. Even now Wolfe had not identified any language in dispute or provided any model of "standard title company language." The settlement agreement set forth the essential terms of the note and deed of trust, and the parties had agreed that Temporary Judge Keller would resolve any subordinate issues. (2) Horvath had not committed extrinsic fraud. Wolfe had lived on the subject property for 15 years, he owned a half-interest in it from 2000 on, and he helped to construct the units that he now claimed to be surprised were done without permits. Furthermore, Horvath had informed him of all the material facts long before the parties settled the lawsuit. In any event, the parties had generally released all known and unknown claims as part of the settlement.

The order and judgment

Temporary Judge Keller issued a written order granting Horvath's motion. As relevant on appeal, the order states:

1. The agreement was not unenforceable for ambiguity. The parties had agreed to use standard form notes and deeds of trust, and Horvath had obtained the standard forms used in his draft documents from a Continuing Education of the Bar (CEB) text on mortgage and deed of trust practice. The parties had also agreed that Temporary Judge Keller would resolve any dispute over language in the documents, but no such dispute ever

arose because neither Wolfe nor his counsel had objected to the draft documents Horvath's counsel sent them.

2. There was no extrinsic fraud. Wolfe had expressly released all claims, known or unknown, thus waiving any possible benefit of Civil Code section 1542. He did not maintain that he was unaware of the nature of the agreement or that Horvath owed him a fiduciary duty. Finally, his assertion that he did not know about the lack of permits was "difficult to accept": Horvath said he had fully informed Wolfe as to the permits before the settlement discussions, and Wolfe lived on the premises for 15 years with ownership as of 2001. Thus, he knew or should have known the facts as to the permits, a matter of public record to which he had immediate and reasonable access.

3. Wolfe was directed to sign the note and deed of trust prepared by Horvath within two weeks, or the court would execute them.

4. Horvath was awarded $4,450 in attorney's fees and costs.

Temporary Judge Keller thereafter entered judgment in accordance with his order. (The judgment is identical to the draft judgment prepared after the oral settlement agreement, except that the word "stipulated" in the caption is crossed out.)

Wolfe filed a notice of appeal that mentioned only the order.[5]

DISCUSSION

I

Wolfe now declares that his appeal is taken from both the judgment and the order enforcing settlement. However, he has not supported his premise that an order enforcing settlement is appealable, and such an order is not specified as appealable in Code of Civil Procedure section 904.1, subdivision (a). Thus, Wolfe has not met his burden to show the order is appealable. Accordingly, we shall dismiss the appeal so far as it purports to be taken from the order. (Cal. Rules of Court, rule 14(a)(2)(B); *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 556-557.)

But on appeal from a judgment, we may also review "any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party." (Code Civ. Proc., § 906.) As the order here involves the merits and affects Wolfe's rights, we shall review it in the context of his appeal from the judgment.

---

[5] Horvath moved to dismiss the appeal on the ground that it failed to refer to the judgment. After briefing, we denied the motion.

II

"If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (§ 664.6.)

In reviewing an order and judgment under section 664.6, we affirm the trial court's factual determinations if supported by substantial evidence, but review other rulings de novo for errors of law. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 815 (*Weddington*).)

Wolfe contends, as below, that the settlement agreement is unenforceable because it is ambiguous in its material terms. We disagree.

The oral settlement agreement recited in open court (and subsequently recorded in the draft judgment) contemplated that the parties would refer any alleged ambiguity in the language of the required documents to Temporary Judge Keller for resolution. Horvath's counsel served Wolfe's counsel with a draft note and deed of trust on October 10, 2002, within the time required by the settlement agreement. Originals of the note and deed of trust were forwarded to Wolfe's attorney on November 26, 2002. During the next 10 months, neither Wolfe nor his counsel made any written objection to any particular wording in the documents

or requested that Temporary Judge Keller resolve any dispute about them.[6] To the contrary, Wolfe made payments under the note without objection in October, November, and December, 2002, and in January, February, and March, 2003. From this history Temporary Judge Keller could reasonably conclude, as do we, that Wolfe did not truly find the terms of the settlement agreement ambiguous. Had any of the terms been ambiguous, Wolfe could have asked Temporary Judge Keller to clarify them. Wolfe could not fairly make a claim of ambiguity for the first time after Horvath moved to enforce the agreement.

Citing *Weddington, supra,* 60 Cal.App.4th 793, Wolfe asserts: a court may not "create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon." *Weddington* is inapposite on this point.

In *Weddington*, *supra*, 60 Cal.App.4th 793, one party to alternative dispute resolution withdrew from the process when only a preliminary agreement had been reached and many material

---

[6] Wolfe asserts he and his counsel did object. His record citation does not show any *timely* objection, however. He cites only to the declarations he and his counsel submitted in opposition to the motion to enforce the settlement. Both declarations assert the declarants' "understanding" that Horvath would draft documents with "standard" language taken from title company forms, not from other sources (such as practice treatises). But neither declaration states that Wolfe or his counsel objected to Horvath's draft documents on this basis or tendered any dispute about them to Temporary Judge Keller before Horvath moved to enforce the settlement. In any event, the order enforcing the settlement unequivocally finds that Wolfe did not object, and substantial evidence supports that finding.

terms were unresolved. The private judge and the other party continued the process in the first party's absence. The private judge then crafted an order that simply imposed terms on the first party. (*Id.* at pp. 796-797.) The parties had neither signed a writing memorializing an agreement nor entered into an oral agreement before a court--the two alternative prerequisites for an enforceable settlement agreement. (*Id.* at p. 810.)

Here, on the other hand, the parties entered into an oral agreement before Temporary Judge Keller. Furthermore, Judge Keller evidently thought the written draft judgment prepared at that time reflected the parties' agreement accurately, as it is substantively identical to the judgment he entered along with the order enforcing settlement. Thus, Temporary Judge Keller did not create any terms--he simply enforced the terms the parties had already agreed on.

So far as Wolfe asserts the terms were materially ambiguous because they provided for referring disputes to Temporary Judge Keller for resolution, the claim is without merit. In the first place, this argument contradicts Wolfe's position at the time of the oral settlement: by agreeing to all its terms, including the term that made Temporary Judge Keller the arbiter of any future disputes, he indicated his belief the terms were sufficiently definite. In the second place, an agreement is not unenforceable merely because the parties may need to resolve issues down the road, so long as the agreement spells out the means to do so. (See *Herman v. County of Los Angeles* (2002) 98

Cal.App.4th 484, 488 [contracting parties may agree "to cross certain bridges when they are reached"].)

So far as Wolfe asserts that his reservation of appeal rights at the time of the oral settlement indicates a fatal ambiguity in its terms, he does not support this novel theory with authority and we know of none that could support it.

The order enforcing settlement correctly found the settlement terms were unambiguous.

III

Wolfe contends the agreement was vitiated by extrinsic fraud. We disagree.

"Extrinsic fraud is a broad concept that tends to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. [Citations.] Generally, it arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense. [Citations.] . . . Extrinsic fraud includes a false promise of compromise that induces a party to act or refrain from acting in such a[] way as to deprive that party of a fair opportunity to litigate his or her case. [Citations.] A finding of extrinsic fraud does not require that a party actually be physically prevented from appearing at a conference or hearing, as long as the fraudulent promise to settle or drop a litigated matter causes the party to forego an opportunity to prosecute or contest a case, or to be deprived of a fair hearing. [Citations.]" (*Estate of Beard* (1999) 71 Cal.App.4th 753, 774-775.)

Wolfe claims extrinsic fraud of two kinds. First, he accuses Horvath of "misrepresentations as to payment of the Khatri note and deed of trust of $50,000"; second, he accuses Horvath of "non-disclosure as to the non permitted motel units." This assertion fails for several reasons.

First, both alleged examples of extrinsic fraud are merely asserted, without any developed argument to show how they could have deprived Wolfe of a fair hearing. Bare assertion without argument is insufficient to establish any point on appeal. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

Second, so far as the record shows, Wolfe failed to call the alleged extrinsic fraud as to the Khatri note and deed of trust to the trial court's attention. Although Wolfe's declaration opposing the motion to enforce the settlement mentioned this point, his points and authorities did not. Temporary Judge Keller was not required to comb through the parties' declarations looking for material points they failed to present in their arguments. Wolfe's failure to raise this factual point squarely below bars him from raising it for the first time on appeal. (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780.)

Third, Temporary Judge Keller made a factual finding that there was no extrinsic fraud as to the non-permitted motel units because Wolfe either knew or should have known about them before he settled. Wolfe does not challenge this factual finding, which is clearly supported by substantial evidence.

Wolfe has failed to show the judgment should be set aside for extrinsic fraud.

DISPOSITION

Appellant's appeal from the order enforcing settlement is dismissed. The judgment is affirmed. Horvath shall receive his costs on appeal. (Cal. Rules of Court, rule 27(a).)

SIMS, Acting P.J.

We concur:

MORRISON, J.

BUTZ, J.